IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

Present:

Mr. Justice Syed Refaat Ahmed, Chief Justice

Mr. Justice Md. Ashfaqul Islam

Mr. Justice Zubayer Rahman Chowdhury

Mr. Justice Md. Rezaul Haque

Mr. Justice S. M. Emdadul Hoque

CRIMINAL APPEAL NO. 64 OF 2024 WITH CRIMINAL APPEAL NOS. 63, 42 AND 39 OF 2024.

(From the judgment and order dated 30.10.2018 passed by the High Court Division in Criminal Revision No. 741 of 2018, Criminal Appeal Nos. 1676, 2292 and 2215 of 2018).

Begum Khaleda Zia alias Khaleda Zia	. . . Appellant. (In Crl. A. Nos. 63-64 of 2024)
Sharfuddin Ahmed	. . . Appellant. (In Crl. A. No. 42 of 2024)
Qazi Saleemul Huq alias Qazi Kamal	. . . Appellant. (In Crl. A. No. 39 of 2024)

-VERSUS-

Durnity Daman Commission represented by its Chairman and another	. . . Respondents. (In Crl. A. No. 64 of 2024)
The State and another	. . . Respondents. (In Crl. A. Nos. 63, 42, 39 of 2024)

For the Appellant (In Crl. A. Nos. 63-64 of 2024)	:	Mr. Zainul Abedin, Senior Advocate with Mr. A.M. Mahbub Uddin, Senior Advocate, Mr. Bodruddozza, Senior Advocate, Mr. Md. Ruhul Quddus, Senior Advocate, Mr. Sheikh Mohammad Zakir Hossain, Senior Advocate, Mr. Raghib Rouf Chowdhury, Senior Advocate, Mr. Kayser Kamal, Advocate, Mr. A S M Sazzad Haider, Advocate Mr. Kazi Akhter Hosain, Advocate and Mr. Mohammad Ali, Advocate instructed by Mr. Zainul Abedin, Advocate-on-Record.
For the Appellant (In Crl. A. No. 42 of 2024)	:	Mr. Md. Ruhul Quddus, Senior Advocate with Mr. A S M Sazzad Haider, Advocate and Mr. Kazi Akhter Hosain, Advocate instructed by Mr. Md. Helal Amin, Advocate-on-Record.

For the Appellant (In Crl. A. No. 39 of 2024)	:	Mr. S.M. Shajahan, Senior Advocate with Mr. Kayser Kamal, Advocate instructed by Mr. M. Ashrafuzzaman Khan, Advocate-on-Record.
For Respondent No.1 (In Crl. A. No. 64 of 2024)	:	Mr. Md. Ashif Hasan, Senior Advocate instructed by Ms. Sufia Khatun and Mr. Satya Ranjon Mondall, Advocates-on-Record.
For Respondent No.2 (In Crl. A. No. 64 of 2024)	:	Mr. Mohammad Arshadur Rouf, Additional Attorney-General, Mr. Aneek R. Hoque, Additional Attorney-General, Mr. Abdullah Al Mahmud, Deputy Attorney-General, Ms. Fatema Akter, Assistant Attorney-General, Mr. Ahmed Musunna Chowdhury, Assistant Attorney-General and Mr. Ahmed Abdullah Khan, Assistant Attorney-General instructed by Mr. Md. Helal Amin, Advocate-on-Record.
For Respondent No.1 (In Crl. A. No. 63 of 2024)	:	Mr. Aneek R. Hoque, Additional Attorney-General, Mr. Abdullah Al Mahmud, Deputy Attorney-General, Ms. Fatema Akter, Assistant Attorney-General, Mr. Ahmed Musunna Chowdhury, Assistant Attorney-General and Mr. Ahmed Abdullah Khan, Assistant Attorney-General instructed by Mr. Md. Helal Amin, Advocate-on-Record.
For Respondent No.2 (In Crl. A. No. 63 of 2024)	:	Mr. Md. Ashif Hasan, Senior Advocate instructed by Ms. Sufia Khatun and Mr. Satya Ranjon Mondall, Advocates-on-Record.
For Respondent No.1 (In Crl. A. No. 42 of 2024)	:	Mr. Aneek R. Hoque, Additional Attorney-General (appeared with the leave of the Court).
For Respondent No.2 (In Crl. A. No. 42 of 2024)	:	Mr. Md. Ashif Hasan, Senior Advocate instructed by Ms. Sufia Khatun and Mr. Satya Ranjon Mondall, Advocates-on-Record.
For Respondent No.1 (In Crl. A. No. 39 of 2024)	:	Mr. Aneek R. Hoque, Additional Attorney-General, Mr. Abdullah Al Mahmud, Deputy Attorney-General, Ms. Fatema Akter, Assistant Attorney-General, Mr. Ahmed Musunna Chowdhury, Assistant Attorney-General and Mr. Ahmed Abdullah Khan, Assistant Attorney-General instructed by Mr. Md. Helal Amin, Advocate-on-Record.
For Respondent No.2 (In Crl. A. No. 39 of 2024)	:	Mr. Md. Ashif Hasan, Senior Advocate instructed by Ms. Sufia Khatun and Mr. Satya Ranjon Mondall, Advocates-on-Record.

Date of hearing : 7th, 8th, 9th and 14th January, 2025.
Date of judgment : 15th January, 2025.

J U D G M E N T

Syed Refaat Ahmed, C.J. : The facts and issues in these cases are so inextricably entwined that these are necessarily, therefore, taken up for analogous consideration and disposal.

Criminal Appeal No. 64 of 2024 along with Criminal Appeal No. 63 of 2024, both preferred by Begum Khaleda Zia, alongside Criminal Appeal No. 42 of 2024, preferred by the Appellant Sharfuddin Ahmed, and Criminal Appeal No. 39 of 2024, preferred by the Appellant Qazi Saleemul Huq alias Qazi Kamal, stem from Criminal Petitions for Leave to Appeal Nos. 400 of 2019, 399 of 2019, 1371 of 2024, and 643 of 2019, respectively. These appeals challenge the judgment and order dated October 30, 2018, rendered by the High Court Division in Criminal Revision No. 741 of 2018, in conjunction with Criminal Appeal Nos. 1676 of 2018, 2292 of 2018, and 2215 of 2018, wherein the Rule was made absolute and the appeals were dismissed.

The prosecution case as discerned from the records is that one Harunur Rashid, the then Sub-Assistant Director (later on promoted to Deputy Director) of the Anti-Corruption Commission (ACC), (Inquiry and Investigation-1), Head Office, Dhaka, acting as the informant, lodged a First Information Report (FIR) registered as Ramna Police Station Case No. 8 dated 3.7.2008 under sections 409 and 109 of the Penal Code, 1860 read with section 5(2) of the Prevention of Corruption Act, 1947 (PCA, 1947) and Rule 5 of the Emergency Power Rules, 2007 against seven individuals, including the Appellants. The FIR implicated the Appellants alleging, *inter alia*, that Begum Khaleda Zia, in her capacity as Prime Minister from 1991 to 1996, had Current Account No.

5416 dated 2.6.1991 opened in the name of the *'Prime Minister's Orphanage Fund'* at Sonali Bank, Ramna Branch, Dhaka. It was further alleged that an amount of USD 1,255,000 (equivalent to BDT 4,44,81,216/-) was deposited into the said Current Account through Pay Order No. 153367970 from the United Saudi Commercial Bank on 9.6.1991.

The gravamen of the charges and accusations brought forth was, therefore, of a criminal breach of trust or a fiduciary responsibility evident in alleged wrongful dealings in entrusted funds.

The case strung together against Begum Khaleda Zia is that she in her capacity as Prime Minister was entrusted with certain property, in the present case being a specific quantum of trust fund, and contended to have dominion over fund property long after she left public office and dealt with such entrusted property in a manner as is liable to bring such action under the mischief of the Penal Code's provisions criminalizing the act of *"Criminal Breach of Trust"* (section 409). Begum Zia is additionally alleged by the prosecution to have abetted irregular dealings in such entrusted property at all material times of her alleged sustained dominion over such property.

The offence of criminal breach of trust, it must be noted at the outset, has essential constituent elements prescribed by the law (i.e., section 405 of the Penal Code) as identifies illegal use of entrusted property for personal gain as the core element of the prosecution's case to satisfy the test of law. Central, therefore, to the establishment of such breach of trust is the violation of a fiduciary duty evident, for example, in a dishonest misappropriation or conversion for personal use or gain (as punished under section 403 of the Penal Code) or any other dishonest use or disposal of that property in violation of either the law or any contract.

The prosecution case further asserts that the Appellant, Begum Khaleda Zia, did not utilize the aforementioned funds for the benefit of any orphanage within the country between 9.6.1991 and 5.9.1993. Moreover, she neither formulated any rules for the administration of the said Orphanage nor adhered to the existing regulations concerning the operation and management of any orphanages or trusts as such. Instead, on 5.9.1993, she established the *'Zia Orphanage Trust' ('Trust')* with the intent to dishonestly misappropriate the said amount through her family members. She registered the Trust at the Gulshan Sub-Registry Office under Registration No. IV-30, listing the address as 6, Shaheed Mainul Road, Dhaka. Subsequently, she nominated her elder son, Mr. Tarique Rahman, her younger son, late Arafat Rahman, and her sister-in-law's son, Mr. Mominur Rahman as members of the Board of Trustees. Furthermore, Mr. Tarique Rahman was designated as the author of the Trust (settlor). Thereafter, she opened STD Bank Account No. 7 on 9.10.1993 through Mr. Tarique Rahman in the name of the Trust at Sonali Bank, New North Circle Branch, Gulshan, Dhaka, and transferred BDT 2,33,33,500/- from Current Account No. 5416 of the *'Prime Minister's Orphanage Fund'* to STD Account No. 7 of the Trust through cheque number 8431103 dated 13.11.1993 for the establishment of an orphanage in Bogura. Subsequently, on 4.2.1993 BDT 4,00,000/- was withdrawn from the said account, however, only BDT 2,77,000/- was spent to purchase 2.79 acres of land in the name of the Trust in Bogura. The remainder of the amount remained unspent for a considerable period, eventually accruing interest to reach BDT 3,37,09,757.32/- as of 12.4.2006.

The prosecution argued that the Appellant, Begum Khaleda Zia, at that juncture and with the fraudulent intent of misappropriating the sum of BDT

3,37,09,757.32 standing in STD Account No. 7, in collusion with other Appellants, issued five cheques totaling BDT 3,30,00,000/-. The contention is that these transactions were predominantly executed through Mr. Tarique Rahman and Mr. Mominur Rahman. They in turn instructed the Appellant, Qazi Saleemul Huq alias Qazi Kamal to open Fixed Deposit Receipts (FDRs) at Prime Bank Limited, Gulshan Branch. Consequently, Appellant Qazi Saleemul Huq alias Qazi Kamal received all the aforementioned cheques and subsequently deposited them at Prime Bank Limited, Gulshan Branch. Thereafter, he directed the then Manager of the Branch, Mahmood Hossain to open FDR accounts upon the encashment and collection of the said cheques.

Out of the aforementioned cheques, Cheque No. 4882407 for an amount of BDT 50,00,000/- dated 12.4.2006 was encashed on 13.4.2006, and FDR No. 41029462 was opened on the same day in the name of the Appellant, Qazi Saleemul Huq alias Qazi Kamal. Subsequently, the said FDR was encashed and a new FDR being No. 41033338 for BDT 50,68,450/- inclusive of interest, was opened on 16.7.2006 in the name of the Trust.

Further, Cheque No. 4882406 for BDT One crore dated 15.6.2006 was encashed on the same date and FDR No. 41032276 was opened in the name of Appellant Qazi Saleemul Huq alias Qazi Kamal. Another cheque being No. 4882403 for BDT One crore dated 15.6.2006 was received by way of account payee transfer to the Trust and FDR No. 41032669 dated 27.6.2006 was opened in the name of the Trust.

The remaining two cheques dated 4.7.2006 and 5.7.2006 for amounts of BDT 50,00,000/- and BDT 30,00,000/- respectively were also credited via account payee transfer to the Trust and a consolidated FDR being No. 4103317 for BDT 80,00,000/- was opened on 9.7.2006 in the name of the Trust.

Subsequently, pursuant to an oral instruction from the Appellant, Qazi Saleemul Huq alias Qazi Kamal and an alleged purported resolution passed by the Board of Trustees of the Trust, Prime Bank Limited, Gulshan Branch, transferred two FDRs- one for BDT One Crore in the name of the Trust and another for the same amount in the name of the Appellant, Qazi Saleemul Huq alias Qazi Kamal- to Prime Bank Limited, Eskaton Branch, through inter-bank credit advice. At the Eskaton Branch, an FDR bearing No. 41022619/73193, amounting to BDT 1,03,19,365/- inclusive of interest, was opened on 16.11.2006 in the joint names of the Appellant, Qazi Saleemul Huq alias Qazi Kamal, and Syed Ahmed alias Sayeed Ahmed.

Another FDR bearing No. 41024435/73491 for BDT 1,06,38,686/- was opened on 7.2.2007 in the name of Gias Uddin Ahmed. Subsequently, the FDR held jointly in the names of Appellant Qazi Saleemul Huq alias Qazi Kamal and Syed Ahmed was encashed and a fresh FDR being No. 41025511 for BDT 1,04,32,957.80/- inclusive of interest was opened on 7.2.2007 in the name of Gias Uddin Ahmed. Thereafter, Gias Uddin Ahmed encashed the aforementioned two FDRs on 15.2.2007 and caused the total amount of BDT 2,10,71,643.80/- to be issued in his name through six pay orders. The entirety of the proceeds was subsequently deposited into Current Account No. 11013134 of Prime Bank Limited, Eskaton Branch, belonging to his brother, Sharfuddin Ahmed. Subsequently, the total amount of BDT 2,10,71,643.80/- was withdrawn from the account of Sharfuddin Ahmed and allegedly misappropriated. Appellant Qazi Saleemul Huq alias Qazi Kamal, in his capacity as the Chairman of Prime Bank Limited and wielding significant influence over the Branch Managers, is said to have, therefore, facilitated the opening of all the FDRs, their subsequent encashment and the eventual deposit

of the proceeds into the account of Sharfuddin Ahmed. Thus comes to rest the story of the Appellants and the alleged misappropriation of the entire aforementioned sum of money.

Upon completion of the investigation, the Investigating Officer submitted a charge sheet, being Charge Sheet No. 372 dated 5.8.2009 against six accused persons, including the Appellants, under sections 409/109 of the Penal Code read with section 5(2) of the PCA, 1947. The case record was subsequently forwarded to the learned Metropolitan Senior Special Judge, Dhaka, who, by an order dated 7.9.2009, took cognizance of the offences against the Appellants and the other accused persons. Thereafter, the case was transferred to the Special Judge Court No. 3, Dhaka, for trial, where it was registered as Special Case No. 3 of 2010. On 19.3.2014, the learned Special Judge, Court No. 3, Dhaka, framed charges against the Appellants and the other accused persons under sections 409/109 of the Penal Code read with section 5(2) of the PCA, 1947. The charges were duly read over and explained to the accused persons, to which they all pleaded not guilty and claimed to be tried in accordance with law. Thereafter, the case was eventually transferred from the Special Judge Court No.3, Dhaka to the Special Judge Court No. 5, Dhaka for holding trial and the same was renumbered as Special Case No. 17 of 2017.

During the course of the trial, the prosecution examined thirty-two witnesses out of the thirty-six listed. The Appellants cross-examined certain witnesses, while declined to cross-examine others. Appellant Begum Khaleda Zia cross-examined twenty-three witnesses yet opted not to examine any defence witnesses. In contrast, Appellant Qazi Saleemul Huq alias Qazi Kamal examined one defence witness, while Appellant Sharfuddin Ahmed examined

three defence witnesses in support of their respective cases. Upon the conclusion of the examination of witnesses, the Appellants were examined under section 342 of the CrPC, during which they categorically asserted their innocence of the charges brought against them.

The defence case, as articulated by the Appellant Begum Khaleda Zia in her statement read out in Court and as reflected in the tenor of the cross-examination of prosecution witnesses conducted by the Counsel for the Appellants, may be summarized as follows:

> No fund exists under the name of the *'Prime Minister's Orphanage Fund',* and Begum Khaleda Zia neither had any involvement in the opening of Bank Account No. 5416 in the name of the purported fund, nor in the transfer of any money from the said account. It is further contended that the fund in question was brought by late Mr. Mustafizur Rahman, the then Foreign Minister, from the Emir of Kuwait as a donation intended for the welfare of orphans in Bangladesh, established in the name of late President Ziaur Rahman. The Appellant maintains her innocence, claiming that the case was instituted against her with mala fide intent, motivated by political considerations aimed at harassing her, and tarnishing her public image. She has unequivocally stated that she was neither the settlor, nor a trustee, nor a beneficiary of the Trust in question. The defence stance of the other Appellants aligns with that of Begum Khaleda Zia. They contend that no misappropriation of funds occurred, and no offence was committed as alleged in the FIR.

Upon the conclusion of the trial, the learned Special Judge of Special Judge Court No. 5, Dhaka, by judgment and order dated 8.2.2018 convicted the Appellant Begum Khaleda Zia under sections 409 and 109 of the Penal Code. She was sentenced to rigorous imprisonment for a term of five years and directed to pay a fine of BDT 2,10,71,643.80/- to be borne equally by all the convicted persons. The remaining Appellants were convicted under sections 409/109 of the Penal Code and each was sentenced to rigorous imprisonment for a term of ten years. Additionally, they were ordered to jointly pay the fine of BDT 2,10,71,643.80/- to be equally shared by all the convicted individuals.

Being dissatisfied with the sentence imposed upon Appellant Begum Khaleda Zia, which the Respondent 'Durnity Daman Commission' or the ACC deemed inadequate, the Commission filed Criminal Revision No. 741 of 2018 before the High Court Division seeking an enhancement of the sentence and, accordingly, obtained a Rule. Concurrently, being discontented with the judgment and order dated 8.2.2018 Appellant Begum Khaleda Zia preferred Criminal Appeal No. 1676 of 2018 before the High Court Division challenging her conviction and sentence. Additionally, Appellant Sharfuddin Ahmed, aggrieved by the same judgment and order filed Criminal Appeal No. 2292 of 2018, while Appellant Qazi Saleemul Huq alias Qazi Kamal preferred Criminal Appeal No. 2215 of 2018, both before the High Court Division, contesting their respective convictions and sentences.

The High Court Division, after hearing Criminal Appeal No. 1676 of 2018 together with Criminal Appeals No. 2215 of 2018 and No. 2292 of 2018 and Criminal Revision No. 741 of 2018, analogously dismissed the appeals and made the Rule absolute in Criminal Revision on 30.10.2018. The High Court Division convicted Appellant Begum Khaleda Zia under section 409 of the

Penal Code as well as section 5(2) of the PCA, 1947. Consequently, her sentence was enhanced to rigorous imprisonment for a period of ten years, and the fine imposed by the learned Special Judge was upheld.

Being aggrieved by the judgment and order of the High Court Division, the Appellants preferred Criminal Petition for Leave to Appeal Nos. 400 of 2019, 399 of 2019, 1371 of 2024, and 643 of 2019 before this Division. Upon due consideration, leave was granted in all the petitions primarily on the grounds that the petitions had merit for consideration.

The facts-in-common providing the essential premise for CPLA Nos. 399 and 400 of 2019 filed on behalf of the Petitioner-Appellant Begum Khaleda Zia, the leave granting orders dated 11.11.2024 in both petitions record identical statements as to the case argued in defence before the High Court Division disposing of Criminal Revision No. 741 of 2018 with Criminal Appeal Nos. 1676 of 2018, 2215 of 2018 and 2292 of 2018. That statement-in-common featuring in both leave granting orders is reproduced hereinbelow:

> *"The defence case, as it transpires from the statement of the petitioner which was read out by her in Court and the trend of cross-examination of the witnesses, in brief, is that there is no such fund as PM's Orphanage Fund and she was never involved with the opening of the Bank Account being No. 5416 in the name of Prime Minister's Orphanage Fund or the transfer of money from the said account. Late Mustafizur Rahman, the then Foreign Minister, brought the said fund from the Amir of Kuwait who donated the same for the well-being of the orphans in Bangladesh in the name of the President Ziaur Rahman. She is innocent and this case has been initiated against her for political harassment and to tarnish her image before the countrymen. She was neither the settlor, nor a trustee, nor a beneficiary of the said Trust."*

In CPLA No. 400 of 2019 arising out of Criminal Revision No. 741 of 2018 dealing with the issue of enhancement of the sentence of the Petitioner-Appellant Begum Khaleda Zia. The grounds taken were-

I. *For that the High Court Division committed error of law in enhancing the sentence of the petitioner without any reasons or observation as to why the sentence of the learned Special Judge, Special Judge Court No.5, Dhaka in Special Case No. 17 of 2017 was considered as inadequate;*

II. *For that the High Court Division committed error of law in enhancing the sentence of the petitioner to 10 years of rigorous imprisonment merely on the ground that since other convicts were awarded 10 years of rigorous imprisonment, the petitioner was also required to be awarded the same sentence, without considering the lack of the evidence of involvement of the petitioner in the alleged offence;*

III. *For that the High Court Division committed an error of law in convicting the petitioner by holding that it was her obligation "to secure due welfare and proper use of fund obtained as no such requirement exists either under section 5(1) of the Prevention of Corruption Act, 1947 or section 409 of the Penal Code;*

IV. *For that no documentary evidence having been adduced to indicate the aims and objects of the entrustment, the High Court Division committed error of law in holding that the fund was dealt with contrary to the aims and objects of the entrustment;*

V. *For that enhancement of sentence can be made only in appeal against the original Judgment passed in general law in view of Section 423(bb) of the Code of Criminal Procedure, but the petitioner has been convicted under Section 409 of the Penal Code read with Section 5(2) of the Prevention of Corruption Act, 1947 against which appeal lies under Section 10 of the Criminal Law Amendment Act, 1958. However, Section 10 of the Criminal Law Amendment Act, 1958 provides no provision for enhancement of sentence under that Act and as such, the Criminal Revision No. 741 of 2018 filed by the Anti-Corruption Commission is void ab initio. Consequently, the Judgment and order passed by the High Court Division convicting the petitioner and others under Section 409 of the Penal Code read with Section 5(2) of the Prevention of Corruption Act, 1947 is liable to be vitiated as a whole;*

VI. *For that section 439(5) of the Code of Criminal Procedure clearly bars revision where appeal lies but the respondent being misconceived of law filed revision for enhancement of sentence which is not sustainable in law and as such, the Judgment and order of conviction and sentence of the petitioner is liable to be set aside as a whole.*

On the other hand, the grounds taken in CPLA No. 399 of 2019 filed against the High Court Division’s judgment and order dated 30.10.2018 affirming the conviction and enhancing the sentence of the Petitioner were-

I. *Because the judgment and order of the High Court Division affirming the conviction of the petitioner and enhancing her*

sentence is based on (a) errors of law; and (b) misconceived views of law; and (c) gross non-reading and misreading of evidence on record; and (d) insufficient and/or no evidence on record and (e) bias and (f) the same is predicated upon fallacious presumptions and perverse reasoning, and as such, the judgment and order of the High Court Division is bad and unsustainable in law.

II. Because the judgment of the High Court Division is engulfed in errors of law in that:

a. For 'criminal breach of trust' to be proved there has to be proof of entrustment, misappropriation, conversion to one's dishonest own use, dishonest use or disposal of the property or willfully causing any other person to do any such act. In the process, one must gain unlawfully. In the instant case there is clear evidence on record that the fund in question is still intact and there has been no misappropriation or conversion or use or disposal of the fund for anyone's gain. The High Court Division, in the absence of any evidence of any such 'gain' of the petitioner or any one, has erroneously made up a case that the fund had not been used for 13 years and therefore, the offence of criminal breach of trust has been committed.

b. the High Court Division made an error in analyzing section 5(1) of the Prevention of Corruption Act, 1947 holding that the petitioner 'allowed' others to dishonestly or fraudulently misappropriate the fund while there is convincing evidence on record that the fund in question remains intact in the account of the Zia Orphanage Trust and there is no evidence on record that any person was ever benefited or gained from any transaction of the funds of the said trust or any person enjoyed the fund of the said trust in any manner.

c. the High Court Division has referred the notions of belief or observation of 'prudent' and 'reasonable' man in the judgment disregarding and ignoring that the standard of proof demanded in any criminal trial is that of proving facts 'beyond reasonable doubt'.

d. The High Court division wrongly shifted the burden of proof to the defense erroneously holding that the Appellant-Petitioner had 'entrustment' and control and domain over the fund without first establishing the same by clear and cogent evidence. Moreover, the defense was also denied of the opportunity to adduce additional evidence to prove its version of the facts.

e. The High Court Division has assailed Appellant-Petitioner for 'deliberate inaction' regarding the non- use of the trust fund. The High Court Division is palpably wrong in coming to such conclusion since (i) the petitioner had no connection with the Sonali Bank Account and (ii) even if it is accepted arguendo that the petitioner had knowledge of transfer of funds to Zia Orphanage trust, she had no reason

and legal obligation to supervise the conduct of a private trust fund as the Prime Minister of Bangladesh.

f. *The High Court Division's finding that the Zia Orphanage Trust is a "paper trust" is a wrong finding under the Trust Act and as per the evidence on record. Merely because a 'trust' or any legal entity remains dormant for some time, does not render a trust 'paper trust' or non-entity in law. The Zia orphanage Trust in its attempt to commence activity purchased a piece of land in Bogura measuring 2.79 acres.*

g. *the High Court Division committed error of law in convicting the Appellant-petitioner by holding that it was her obligation "to secure due welfare and proper use of fund obtained as no such requirement exists either under section 5(1) of the Prevention of Corruption Act, 1947 or section 409 of the Penal Code.*

h. *the High Court Division committed error of law in holding that the "non- functioning of the Trust and keeping the fund in the account of the said Trust for long 13 years" amounted to act and omission of inaction on the part of the petitioner allowing to cause wrongful gain of others which constituted act of misappropriation, whereas an omission/inaction in respect of any fund by way of entrustment cannot be regarded as misappropriation or breach of trust in law; rather requires some positive act on the part of a person entrusted with the fund.*

It is to be noted that earlier on 19.8.2024 this Division was in *seisin* of two Criminal Petitions for Leave to Appeal being Nos. 643 of 2019 and 1371 of 2024 filed by Qazi Saleemul Huq alias Qazi Kamal and Sharfuddin Ahmed respectively. Both Petitioners being aggrieved by the High Court Division's judgment and order dated 30.10.2018 analogously disposing of Criminal Appeal Nos. 2215 and 2292 of 2018 respectively cited grounds on the basis of which leave was granted in each case to prefer appeals being Criminal Appeals Nos. 39 and 42 of 2024 respectively. The grounds taken in CPLA No. 643 of 2019 are:

I. *For that upon finding on an offence of abetment of criminal breach of trust, the High Court Division should have been satisfied that the convict-petitioner either instigated the principal offender, Begum Khaleda Zia to commit criminal breach of trust or engaged with her in any conspiracy and as result of which criminal breach of trust. The High Court*

Division, without being satisfied as to the basic principles of actus reus (external element) and mens rea (mental element) elements of the offence of abetment under sections 409/109 of the Penal Code, came to an erroneous conclusion that the convict-petitioner abetted criminal breach of trust. Hence, the judgment and order of conviction and sentence is liable to be set aside.

II. *For that section 109 of the Penal Code, 1860 stipulates that intentional aiding, conspiracy or instigation is not enough to constitute the offence of abetment of criminal breach of trust and the prosecution has to prove that criminal breach of trust took place as a consequence of such conspiracy, intentional aiding or instigation.*

III. *For that when the amount of Tk.2,33,33,500/- was transferred in 1993 from Prime Minister's Orphanage Fund to Zia Orphanage Trust through criminal breach of trust or misappropriation, it became stolen property as per section 410 of the Penal Code.*

IV. *For that the High Court Division found that the transactions that took place between 1993 and 2007 was a single transaction. That being so, the nature of the offence committed by each of the participants may be different depending on the facts of the case. Since the convict-petitioner received stolen property, he should have been charged and tried only under section 411 of the Penal Code 1860 for handling stolen property. Hence, the judgment and order of the High Court Division is liable to be set aside.*

The grounds taken in CPLA No. 1371 of 2024 are:

I. *For that the convict-petitioner had nothing to do with the fund as he is admittedly not a trustee of the Zia Orphanage Trust. Ingredients or elements of offence under sections 409/109 of the Penal Code or element of any offence under any law has not been proved beyond reasonable doubt against the convict-petitioner.*

II. *For that the prosecution case is unspecific, vague and ambiguous. The prosecution failed to prove the ingredients of section 409 or section 109 of the Penal Code against the convict-petitioner beyond reasonable doubt.*

III. *For that the convict-petitioner is not a merchant or agent and he not being a merchant or agent, he cannot be tried for commission of offence under section 409 of the Penal Code and as such, the impugned judgment and order of conviction and sentence against the petitioner is liable to be set aside.*

IV. *For that the prosecution has failed to prove any entrustment of property upon the convict-petitioner or entrustment of any dominion over property in any manner defined under section*

> *405 of the Penal Code or dishonest misappropriation of property as defined under section 403 of the Penal Code.*

Consequently, Criminal Appeal Nos. 63, 64, 42, and 39 of 2024 were instituted before this Division. These appeals, having arisen from the same judgment, were heard analogously by this Division.

This Division being asked to take up first Criminal Appeal No. 64 of 2024 stemming from CPLA No. 400 of 2019, Mr. Zainul Abedin, the learned Senior Advocate, appearing for the Appellant Begum Khaleda Zia, along with other learned Senior Advocates Mr. A. M. Mahbub Uddin, Mr. Bodruddozza, Mr. Md. Ruhul Quddus, Mr. Kayser Kamal, and Mr. Kazi Akhtar Hosain, the learned Advocate made submissions asserting that the High Court Division erred in law by enhancing the Appellant's sentence without providing reasons or observations as to why the sentence imposed by the learned Special Judge, Special Judge Court No. 5, Dhaka, in Special Case No. 17 of 2017 was deemed inadequate. They contended that the High Court Division further erred in law by enhancing the Appellant's sentence to ten years of rigorous imprisonment solely on the basis that other convicts were awarded the same sentence. Additionally, they argued that the High Court Division erred in law by convicting the Appellant on the grounds that she was obligated to ensure the proper use and welfare of the obtained funds even given that no such requirement exists either under section 5(1) of PCA, 1947 or section 409 of the Penal Code. Moreover, they highlighted that no documentary evidence was presented to indicate any declared aims and objectives of the entrustment, and thus, the High Court Division erred in law by holding that the funds were dealt with contrary to the aims and objectives of the entrustment. They further skillfully argued that the enhancement of the sentence can only be made in an

appeal against the original judgment under general law in view of section 423(bb) of the Code of Criminal Procedure, 1898 (CrPC). However, the Appellant was convicted under section 409 of the Penal Code read with section 5(2) of the PCA, 1947, against which an appeal otherwise lies under section 10 of the Criminal Law Amendment Act, 1958. Since section 10 of the Criminal Law Amendment Act, 1958 provides no provision for the enhancement of the sentence under that Act, the Criminal Revision No. 741 of 2018 filed by the ACC is *void ab initio*. Consequently, the judgment and order passed by the High Court Division convicting the Petitioner-Appellant and others is liable to be vitiated as a whole. They also contended that section 439(5) of the CrPC clearly bars revision where an appeal lies, but the ACC, being misconceived of the law, filed a revision for the enhancement of the sentence, which is not sustainable in law. Thus, they have vigorously argued for the judgment and order of conviction and the sentence to be set aside in their entirety.

The same set of lawyers appearing for the Appellant, Begum Khaleda Zia in Criminal Appeal No. 63 of 2024 stemming from CPLA No. 399 of 2019 made submissions stating, *inter alia*, that the judgment of the High Court Division affirming her conviction on the charge of criminal breach of trust and enhancing her sentence is based on (a) errors of law, (b) misconceived views of law, (c) gross non-reading and misreading of evidence on record, (d) insufficient and/or no evidence on record, (e) bias, and (f) predicated upon fallacious presumptions and perverse reasoning, and as such, the judgment and order of the High Court Division are bad and unsustainable in law. In substantiation, the learned lawyers have strenuously argued that the judgment of the High Court Division is engulfed in errors of law for the reasons below:

a. As ‘criminal breach of trust’ to be proved there has to be proof of entrustment, misappropriation, conversion to one’s dishonest own use, dishonest use or disposal of the property or willfully causing any other person to do any such act. In the process, one must gain unlawfully. In the instant case there is clear evidence on record that the fund in question is still intact and there has been no misappropriation or conversion or use or disposal of the fund for anyone's gain. The High Court Division, in the absence of any evidence of any such ‘gain’ of the Appellant or any one, has erroneously made up a case that the fund had not been used for thirteen years and, therefore, the offence of criminal breach of trust has been committed.

b. The High Court Division made an error in analyzing section 5(1) of the PCA, 1947 holding that the Petitioner-Appellant ‘allowed’ others to dishonestly or fraudulently misappropriate the fund while there is convincing evidence on record that the fund in question remains intact in the account of the Trust and there is no evidence on record that any person was ever benefited or gained from any transaction of the funds of the said trust or any person enjoyed the fund of the said trust in any manner.

c. The High Court Division has employed the tests of the belief or observation of the 'prudent' and 'reasonable' man in the judgment disregarding and ignoring that the standard of proof demanded in any criminal trial is that of proving facts 'beyond reasonable doubt'.

d. The High Court Division wrongly shifted the burden of proof to the defence erroneously holding that the Appellant had ‘entrustment’ and control and domain over the fund without first establishing the same by clear and cogent evidence. Moreover, the defence was also denied of the opportunity to adduce additional evidence to prove its version of the facts.

e. The High Court Division has assailed the Appellant for ‘deliberate inaction’ regarding the non-use of the trust fund. The High Court Division is palpably wrong in coming to such conclusion since (i) the Appellant had no connection with the Sonali Bank Account and (ii) even if it is accepted arguendo that she had knowledge of the transfer of funds to Trust, she had no reason and legal obligation to supervise the conduct of a private trust fund as the Prime Minister of Bangladesh.

f. The High Court Division's finding that the Trust is a *"paper trust"* is a wrong finding under the Trusts Act, 1882 and as per the evidence on record. Merely because a ‘trust’ or any legal entity remains dormant for some time, does not render a trust 'paper trust' or a non-entity in law. This Court is reminded in this regard that the Trust in its attempt to commence activity purchased a piece of land in Bogura measuring 2.79 acres.

g. The High Court Division committed error of law in convicting the Appellant by holding that it was her obligation to secure due welfare and proper use of the fund obtained given that no such requirement exists either under section 5(1) of either the PCA, 1947 or section 409 of the Penal Code.

h. The High Court Division committed error of law in holding that the *"non-functioning of the Trust and keeping the fund in the account of the said Trust for long 13 years"* amounted to act and omission/inaction on the part of the Appellant allowing to cause wrongful gain of others which constituted act of misappropriation, whereas an omission/inaction in respect of any fund by way of entrustment cannot be regarded as misappropriation or breach of trust in law, rather the act of misappropriation necessarily incorporates an element of a positive act on the part of a person entrusted with the fund.

Mr. Ruhul Quddus, learned Senior Advocate appearing for the convict-Appellant Sharfuddin Ahmed in Criminal Appeal No. 42 of 2024 has made submissions on the grounds that the said Appellant had nothing to do with the fund as he is admittedly not a trustee of the Trust and that the ingredients or elements of the offence under sections 409 read with 109 of the Penal Code or element of any offence under any law have not been proved beyond reasonable doubt against him. Mr. Quddus further submits that the prosecution case is unspecific, vague and ambiguous and that the prosecution failed to prove the ingredients of either section 409 or section 109 of the Penal Code against the said Appellant beyond reasonable doubt. In this regard it is emphasized that the Appellant is not a merchant or agent and, therefore, cannot be tried for commission of offence under section 409 of the Penal Code and as such, the impugned judgment and order of conviction and sentence against him are liable to be set aside. Highlighted also is the fact that the prosecution has failed to prove any entrustment of property upon this Appellant or any control or any

dominion over such property in any manner defined under section 405 of the Penal Code or dishonest misappropriation of property as defined under section 403 of the Penal Code.

Mr. S.M. Shajahan, learned Senior Advocate with Mr. Kayser Kamal, learned Advocate on behalf of the Appellant Qazi Saleemul Huq alias Qazi Kamal in Criminal Appeal No. 39 of 2024 has made submissions stating that in arriving at a finding of an offence of abetment of criminal breach of trust, the High Court Division lost sight of the essential fact that this particular Appellant neither instigated the alleged principal offender, Begum Khaleda Zia to commit criminal breach of trust nor engaged with her in any conspiracy resulting in any criminal breach of trust. Instead, the High Court Division, without being satisfied as to the basic principles of *actus reus* (external element) and *mens rea* (mental element) elements of the offence of abetment under sections 409 and 109 of the Penal Code read together, came to an erroneous conclusion that this Appellant abetted the offence of criminal breach of trust. Hence, Messrs. Shajahan and Kamal argue, the judgment and order of conviction and sentence in this instance as well are liable to be set aside given that section 109 of the Penal Code stipulates that intentional aiding, conspiracy or instigation is not enough to constitute the offence of abetment of criminal breach of trust and the prosecution has to go the extra length to prove that criminal breach of trust took place as a consequence of such conspiracy, intentional aiding or instigation.

The grounds posited on the other hand by the Respondents, including the ACC, in each instances merit recording here before a consideration of the positioning of all parties concerned is undertaken on matters of fact and law. A snapshot of such grounds are, accordingly, provided below:

- **Criminal Appeal No. 39 of 2024**

Grounds taken by the Respondent No. 1, State

The judgment and order of trial court was based on documentary, oral and material evidences available on record which supported the prosecution case while the defence failed to prove his case. Therefore, the impugned judgment and order of the High Court Division deserves to be affirmed by this Court.

Grounds taken by the Respondent No. 2, ACC

In order to constitute an offence under section 409 of the Penal Code there must be the allegation of entrustment of property or dominion over in someone's capacity of being a public servant or banker and misappropriation thereof, however, in absence of either of the aforesaid two ingredients the offence is not complete. Therefore, the appeal may be disposed of on merit for the ends of justice.

- **Criminal Appeal No. 64 of 2024**

Grounds taken by the Respondent No. 1, State

Similar to Criminal Appeal No. 39 of 2024

Grounds taken by the Respondent No. 2, ACC

In view of section 423 (bb) of CrPC the enhancement of sentence can be made only in appeal against the judgment and order of sentence passed by the trial court under general law. However, in the case in hand the Appellant was convicted under section 409 of the Penal Code read with section 5(2) of the PCA, 1947 against which appeal lies under section 10 of the Criminal Law Amendment Act, 1958. Therefore, the appeal may be disposed of on merit for the ends of justice.

- **<u>Criminal Appeal No. 63 of 2024</u>**

<u>Grounds taken by the Respondent No. 1, State</u>

Similar to Criminal Appeal No. 39 of 2024

<u>Grounds taken by the Respondent No. 2, ACC</u>

In order to constitute an offence under section 409 of the Penal Codethere must be the allegation of entrustment of property or dominion over in someone's capacity of being a public servant or banker and misappropriation thereof, however, in absence of either of the aforesaid two ingredients the offence is not complete.

An essential ingredient of offence under section 5(2) of the PCA, 1947 is that there must be the allegation of accepting or obtaining any gratification other than legal remuneration or dishonest or fraudulent misappropriation or receipt of pecuniary advantage by the public servant. In order to prove the same the accused person or any other person on his behalf shall have in possession, for which the accused person cannot satisfactorily account of pecuniary resources or property disproportionate to his known source of income. Therefore, the appeal may be disposed of on merit for the ends of justice.

- **<u>Criminal Appeal No. 42 of 2024</u>**

<u>Grounds taken by the Respondent No. 2, ACC</u>

Similar to Criminal Appeal No. 39 of 2024

Possessed of such facts agitated and legal tenets enunciated, this Division is, however, constrained to preliminarily opine that the *'facta probabilia'* of these appeals taken together cumulatively gravitate towards the attraction first and foremost of the Trusts Act, 1882 to these cases, an

inevitability which inexplicably has eluded the courts below. It is to that lapse and the entire breadth of supporting jurisprudence consequentially left by the wayside to which me must now unavoidably turn in the disposal of these appeals.

Sections 23 and 94 of the Trusts Act accordingly merit a visitation at this juncture-

> *"23.* ***Liability for breach of trust***- *Where the trustee commits a breach of trust, he is liable to make good the loss which the trust-property or the beneficiary has thereby sustained, unless the beneficiary has by fraud induced the trustee to commit the breach, or the beneficiary, being competent to contract, has himself, without coercion or undue influence having been brought to bear on him, concurred in the breach, or subsequently acquiesced therein, with full knowledge of the facts of the case and of his right as against the trustee.*
>
> *A trustee committing a breach of trust is not liable to pay interest except in the following cases:-*
>
> *(a) where he has actually received interest:*
>
> *(b) where the breach consists in unreasonable delay in paying trust-money to the beneficiary:*
>
> *(c) where the trustee ought to have received interest, but has not done so:*
>
> *(d) where he may be fairly presumed to have received interest.*
>
> *He is liable, in case (a), to account for the interest actually received, and, in cases (b), (c) and (d), to account for simple interest at the rate of six per cent. per annum, unless Court otherwise directs.*
>
> *(e) where the breach consists in failure to invest trust-money and to accumulate the interest or dividends thereon, he is liable to account for compound interest (with half-yearly rests) at the same rate.*
>
> *(f) where the breach consists in the employment of trust-property or the proceeds thereof in trade or business, he is liable to account, at the option of the beneficiary, either for compound interest (with half-yearly rests) at the same rate, or for the net profits made by such employment.*

Illustrations

(a) A trustee improperly leaves trust-property outstanding, and it is consequently lost: he is liable to make good the property lost, but he is not liable to pay interest thereon.

(b) A bequeaths a house to B in trust to sell it and pay the proceeds to C. B neglects to sell the house for a great length of time, whereby the house is deteriorated and its market price falls. B is answerable to C for the loss.

(c) A trustee is guilty of unreasonable delay in investing trust-money in accordance with section 20, or in paying it to the beneficiary. The trustee is liable to pay interest thereon for the period of the delay.

(d) The duty of the trustee is to invest trust-money in any of the securities mentioned in section 20, clause (a), (b), (c) or (d). Instead of so doing he retains the money in his hands. He is liable, at the option of the beneficiary, to be charged either with the amount of the principal money and interest, or with the amount of such securities as he might have purchased with the trust-money when the investment should have been made, and the intermediate dividends and interest thereon.

(e) The instrument of trust directs the trustee to invest trust-money either in any such securities or on mortgage of immoveable property. The trustee does neither. He is liable for the principal money and interest.

(f) The instrument of trust directs the trustee to invest trust-money in any of such securities and to accumulate the dividends thereon. the trustee disregards the direction. He is liable, at the option of the beneficiary, to be charged either with the amount of the principal money and compound interest, or with the amount of such securities as he might have purchased with the trust-money when the investment should have been made, together with the amount of the accumulation which would have arisen from a proper investment of the intermediate dividends.

(g) Trust-property is invested in one of the securities mentioned in section 20, clause (a), (b), (c) or (d). The trustee sells such security for some purpose not authorised by the terms of the instrument of trust. He is liable, at the option of the beneficiary, either to replace the security with the intermediate dividends and interest thereon, or to account for the proceeds of the sale with interest thereon.

(h) The trust-property consists of land. The trustee sells the land to a purchaser for a consideration without notice of the trust. The trustee is liable, at the option of the beneficiary, to purchase other

land of equal value to be settled upon the like trust, or to be charged with the proceeds of the sale with interest.";

*"**94.Constructive trusts in cases not expressly provided for-** In any case not coming within the scope of any of the preceding sections, where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands.*

Illustrations

(a) A, an executor, distributes the assets of his testator B to the legatees without having paid the whole of B's debts. The legatees hold for the benefit of B's creditors, to the extent necessary to satisfy their just demands, the assets so distributed.

(b) A by mistake assumes the character of a trustee for B, and under colour of the trust receives certain money. B may compel him to account for such moneys.

(c) A makes a gift of a lac of Taka to B, reserving to himself, with B's assent, power to revoke at pleasure the gift as to Tk. 10,000. The gift is void as to Tk. 10,000, and B holds that sum for the benefit of A."

It would be apt too to introduce at this juncture the essential components of the 1993 Trust Deed setting up the 'Zia Orphanage Trust'.

Summary of the relevant contents of the Trust Deed

Settlor and Trustees:

The settler of this trust is Tarique Rahman.

The trustees appointed under the deed are Tarique Rahman, Mr. Arafat Rahman, and Mr. Mominur Rahman.

Beneficiaries:

The beneficiaries encompass two primary groups:

All direct descendants, both male and female, of the children of the settler and his brother.

All orphans residing in Bangladesh who have lost one or both parents or fulfills other prescribed criteria.

Trust Objectives:

The central objective of the trust is to provide aid and support to Muslim orphans throughout Bangladesh.

Specifically, the trust aims to utilize all generated income towards the fulfillment of its objectives.

The trustees are empowered to acquire, lease, construct, and manage both movable and immovable properties. This includes the authority to transfer, sell, lease, or rent any part of the trust's holdings as deemed appropriate by the Board of Trustees.

Financial Operations:

The trust is authorized to raise funds through diverse means, including accepting gifts, donations, grants, loans, and other forms of financial aid. This can be from governmental, private, or other sources, both within Bangladesh and internationally.

The acceptance of foreign loans or donations is contingent upon approval from the relevant Bangladeshi government authorities.

The Board of Trustees is responsible for investing the trust's assets to maximize profitability while adhering to the laws of Bangladesh. The deed specifically permits investment through various instruments, including Fixed Deposit Receipts (FDRs).

Initial Property:

The initial property allocated to the trust comprises a sum of 100,000 Taka (One lac).

Upon an examination of the relevant provisions of the Trusts Act, 1882, it is clear that the said Act provides a remedy for the act of criminal breach of trust. Section 23 stipulates that a trustee committing a criminal breach of trust is liable to make good the loss sustained by the trust property or the beneficiary as a result. A plain reading of this section indicates that the law regards criminal breach of trust primarily as a civil wrong capable of redress through an appropriate remedy awarded to the party who has suffered loss. The statutory framework under the Trusts Act does not encompass criminal sanctions for such breaches, instead it directs the court to determine the appropriate civil remedy based on the loss caused.

Predicated on the above, for conduct amounting to a criminal breach of trust, which is inherently a civil matter, to attract criminal liability, additional elements must be present. As the Supreme Court of India held in *Delhi Race Club (1940) Ltd and Ors vs. State of Uttar Pradesh and Anr,* reported in *2024 INSC 626; AIR 2024 SC; 4531* that-

> *"Every act of criminal breach of trust may not result in a penal offence of criminal breach of trust unless there is evidence of manipulating act of fraudulent misappropriation. An act of criminal breach of trust involves a civil wrong in respect of which the person may seek his remedy for damages in civil courts but, any criminal breach of trust with a mens rea, gives rise to criminal prosecution as well."*

This essential mental element, the *mens rea*, distinguishes a civil breach from the offence of criminal breach of trust under the Penal Code. Indeed, the relevant provision of the Anti-Corruption Commission Act, 2004 also requires proof of such a culpable mental state.

Criminal breach of trust, as defined under section 405 of the Penal Code, involves the dishonest misappropriation or conversion of property entrusted to

the accused for their own use. The provision explicitly requires 'dishonest intention' (*mens rea*) as a prerequisite for establishing the offence. Therefore, the prosecution must prove both the physical act of misappropriation or conversion (*the actus reus*) and the necessary dishonest state of mind (*mens rea*) accompanying that act. As held by the Supreme Court of India in *Mitesh Kumar J. Sha vs. The State of Karnataka and others*, reported in *2021 INSC 675; AIR 2021 SC 5298* that where the essential ingredients for the criminal offence are not made out, there can be no sustainable case of criminal breach of trust. Similarly, the High Court Division of the Supreme Court of Bangladesh ruled in *Md. Ayubur Rahman vs. State* reported in *56 DLR (2004) 281* that it constitutes an abuse of the court's process to continue criminal proceedings when the prima facie ingredients of the offences, including criminal breach of trust, cannot be established. In the present case, it is this Court's finding, accordingly, that the facts alleged do not demonstrate that the property in question was misappropriated. Consequently, as the act of misappropriation itself has not been established, the requisite dishonest intention cannot logically and readily be inferred. Significantly further, on reviewing the terms and conditions of the trust deed, the Court does not identify any clear breach of its provisions. Nevertheless, even assuming for the sake of argument that a criminal breach of trust did occur, the proper course of action would be to pursue a civil remedy. The essential element of *mens rea* required to found a criminal charge is wholly absent on the facts presented. Furthermore, the necessary concurrence of *mens rea* and *actus reus* cannot be established principally because the factual account fails to demonstrate that any act of misappropriation took place.

The spectre of malicious prosecution has loomed large in this case from its inception onwards and it is to that disquieting element of the manner of prosecution of this case to which this Court must unavoidably now turn. At the very inception of these cases, consecutively two Investigating Officers (I.O.s) named Mr. Nur Mohammad and Mr. Harunur Rashid investigated the case. The 1st I.O. Mr. Nur Mohammad filed charge sheet on 11.6.2008 chargesheeting five accused persons among whom Begum Khaleda Zia did not figure. The said I.O. particularly mentioned at the end of his Report that-

> *"অনুসন্ধানকালে নির্দিষ্ট সময়সীমার মধ্যে প্রাক্তন প্রধানমন্ত্রীর অফিস হতে প্রধানমন্ত্রীর এতিম তহবিলের সংশ্লিষ্ট নথি এবং সংশ্লিষ্ট তথ্য সম্বলিত কাগজপত্র সরবরাহ না করায় প্রাক্তন প্রধানমন্ত্রী বেগম খালেদা জিয়ার সম্পৃক্ততা সম্বন্ধে মতামত প্রদান করা সম্ভব হচ্ছে না।"*

The 2nd I.O. Mr. Harunur Rashid submitted charge sheet copying the Report of the 1st I.O. in toto only adding a paragraph at the end of the report where he implicated Begum Khaleda Zia. It is noted that Harunur Rashid was discharged from his job in 2005 during the BNP-regime due to his illegal appointment at the Bureau of Anti-Corruption. He resumed his position in 2008 at the ACC (the successor entity to the Bureau as established through the Anti-Corruption Commission Act of 2004) and took the charge of the investigation of the present case immediately at the heels of such joining. This provides the essential context of the investigation at this stage being tainted with malice reflected in the added paragraph implicating Begum Khaleda Zia.

Moreover, the 1st I.O. submitted charge sheet under sections 406/109 of the Penal Code on 11.6.2008. The 2nd I.O. filed another charge sheet under sections 409/109 of the Penal Code on 25.6.2008. Section 406 as deals with the offence of criminal breach of trust simpliciter notably, however, is not included in the schedule to the Anti-Corruption Commission Act. To bring the case,

therefore, under the purview of the said Act, the 2nd I.O. inserted section 409 of the Code. This, it is argued on behalf of the Appellants was a deliberate and calculated act born out of malicious intention to bring the alleged acts of Begum Khaleda Zia and other Appellants under the scanner by way of an afterthought given section 409's operational ambit covering criminal breaches of trust by public servants, banks, merchants, or agents.

It has been contended by the prosecution that Begum Khaleda Zia was liable as she was the Prime Minister and her Principal Secretary, Dr. Kamal Uddin Siddiqui appended his signature in the bank account opening form as well as cheques with the direction of the Prime Minister. This issue, however, has not been proved in the case. It has not escaped this Court's attention that the present case was filed while Begum Khaleda Zia was *not* in power. That provided the prosecution ample opportunity of bringing out the concerned note sheet (if any) with regard to the authorization of opening of bank account. That opportunity has been squandered seemingly by the prosecution and, therefore, Begum Khaleda Zia has been implicated without placing a single signature over any piece of document.

The apprehension that has resultantly been generated in the mind of this Court is that the prosecution filed the case without any cogent ground but with a specific design conceived and executed in the manner and form of the second investigation just to implicate a former Prime Minister. This fact does, in this Court's view, inescapably introduce the element of malice and unsavoury intention into this case.

Having, therefore, to contend with the omnipresence of malicious prosecution in this present instance, this Court is constrained to visit the foundations of law and the core constitutional guarantees as militate against the

spectre of such ill-schemed mode of prosecution from being initiated and continued to highly unsalutary consequences.

Every individual, as per the entrenched protective provision of Article 31 of the Constitution of the People's Republic of Bangladesh, the inalienable right not only to be protected by the law but also to be treated in accordance with the law. The ambit of the protection so guaranteed shields against and action that in any way could be detrimental to a person's life, liberty, body, reputation, or property *except* when done in accordance with law. In other words, any action that otherwise detrimentally impinges upon these fundamental aspects of human existence and civic life must comply strictly with the dictates and mandates of the law properly understood and applied. It follows, therefore, that the constitutional space within which one is permitted to proceed against anyone is severely limited or restricted under Article 31 of the Constitution. The constitutional message, accordingly, to anyone about to embark on initiating prosecutory action against anyone is *"tread with utmost discretion and caution"* lest such action risks being singed by the firewall protection accorded under the Constitution to a supposed accused. Concomitantly, therefore, the right to sue anyone is hedged with or qualified strictly by the condition not to abuse that right by proceeding maliciously or without reasonable and probable cause. It is imperative that one must act to so prosecute with an honest intention to protect one's own or the public interest, or if the circumstances are such as to render it *prima facie* probable that the law is on one's side, regardless of one's motives. The bare fundamentals of the act of prosecution as laid out in Halsbury's Laws of England, Vol. 22 (2nd Ed. by Hailsham) at page 3 expressly, and aptly, highlight the component of *"good reason"* as essential to trigger off feasibly any prosecution exercise thus:

> *"A prosecution exists where a criminal charge is made before a judicial officer or tribunal and any person who makes or is actively instrumental in the making or prosecuting of such a charge is deemed to prosecute it, and is called the prosecutor. Thus a person who lays before a Magistrate an information stating that he suspects and has good reasons to suspect another, or who prefers a bill of indictment, is engaged in a prosecution; and he may be responsible for the prosecution, even though the charge made before the Magistrate is an oral."*

Professor Winfield on Torts, Sixth Edition, in Chapter 24, page 47, has this to say about the law of malicious prosecution:

> *"It had to make its way between two competing principles, —the freedom of action that every man should have in bringing criminals to justice and the necessity for checking lying accusations of innocent people. For some time the Judges oscillated between apprehension of scaring off a just accuser and fear of encouraging a false one."*

This Court opines, accordingly, in full subscription of the view above that the profundity of the judicial responsibility of discharging the duty of judicial scrutiny as so clearly highlighted by Winfield above ought not to be lost on anyone least of all the courts.

In realm of malicious prosecution there are two essential elements, namely, that no probable cause existed for instituting the prosecution or suit complained of, and that such prosecution or suit terminated in some way favorably to the defendant therein. In Black's Law Dictionary, malicious prosecution is stated to be:

> *"A judicial proceeding instituted against a person out of the prosecutor's malice and ill-will, with the intention of injuring him, without probable cause to sustain it, the process and proceedings being regular and formal, but not justified by the facts. For this injury an action on the case lies, called action of malicious prosecution."*

Again, the missive here is for the courts to be ever vigilant against ill-intended proceedings not supported by law by lifting the veil of ostensible yet highly deceptive trappings of regularity.

The Law of Torts by Salmond, 14th Ed., (1965) at page 588, it has been stated as follows:

> *"In order that an action shall lie for malicious prosecution or the other forms of abusive process which have been referred to, the following conditions must be fulfilled:*
>
> *(1) The proceedings must have been instituted or continued by the defendant.*
>
> *(2) He must have acted without reasonable and probable cause.*
>
> *(3) He must have acted maliciously.*
>
> *(4) In certain classes of cases the proceedings must have been unsuccessful that is to say, must have terminated in favour of the plaintiff now suing."*

Martin L. Newell, A Treatise on the Law of Malicious Prosecution, False Imprisonment, and the Abuse of Legal Process, 1892, page 6 outlines thus the crucial elements of and redress against malicious prosecution:

> *"A judicial proceeding, instituted by one person against another from wrongful or improper motives, and without probable cause to sustain it. It is usually called a malicious prosecution; and an action for damages for being subjected to such a suit is called an action for malicious prosecution."*

It must be borne in mind that malice in the broader legal context is not only restricted to anger, hatred and revenge, but extends to encompass any other unlawful and unjustifiable motive. It may, therefore, be said that any motive, other than that of instituting criminal proceedings supported by a legally and reasonably substantiated prosecution case, is a malicious motive on the part of a person who acts under the influence of it. In the case of *Province of East Bengal and Others vs. S.M. Faruque and Others* reported in *PLD 1959*

268; LEX/HEPK/0035/1958, it was held that *"reasonable and probable cause"* means a genuine belief based on reasonable grounds that the proceedings are justified. In the case of *Herniman vs. Smith 1938 AC 305 (316),* Lord Atkin said that no better statement of what is reasonable and probable cause is to be found than in the following observation of Hawkins, J., in *Hicks vs. Faulkner (1878) 8 Q B D 167*:

> *I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accused to the conclusion that the person charged was probably guilty of the crime imputed.*

Similarly, Salmond on the Law of Torts, 9th Edition, pages 658-659, elaborates on a plaintiff's duty to take care thus:

> *"Having regard, however, to the facts known to the defendant, he must show a reasonably sound judgment and use reasonable care in determining whether there are sufficient grounds for the proceedings instituted by him, and any failure to exhibit such judgment or care will be imputed to him as a want of reasonable and probable cause."*

In *Mitchell vs. Jenkins,* 5 B. & Ad. 594, by Parke, J.:

> *"The term malice, ... is not to be considered in the sense of spite or hatred against an individual, but of malus animus, and as denoting that the party is actuated by improper and indirect motives."*

In the case of *Naber Shaha vs. Hamsuddin and ors.* reported in *15 DLR (1963) 217; LEX/HEPK/0141/1962*, it was observed:

> *"In a suit for malicious prosecution, rather to sustain an action for malicious prosecution the following essentials must to co-exist:-*
>
> *(1) A prosecution of the plaintiff by the defendant.*

(2) There must be a want of reasonable and probable cause for that prosecution.

(3) The defendant must have acted maliciously (i.e, with an improper motive and not to further the ends of justice.)

(4) The prosecution must have ended in favour of the person proceeded against.

(5) It must have caused damage to the party proceeded against."

The High Court of West Pakistan in the case of *Abdur Rashid vs. The State Bank of Pakistan and Another* reported in *PLD 1970 344; LEX/HWPK/0209/1969* aptly expounded, in detail, the constitutive elements of malicious prosecution upon considering the development in the legal system USA, UK, Australia, India and Pakistan and merits reproduction in extenso:

"The term 'malice', in a prosecution of the nature which is before me, has been held not to be spite or hatred against an individual but of 'malus animus' and as denoting the working of improper and indirect motives. The proper motive for a prosecution is the desire to secure the ends of justice. It should, therefore, be shown that the prosecutor was not actuated by this desire but by his personal feelings--See Mitchell v. Jenkins (1833) 5 B & Ad. 588; Pike v. Waldrum (1952) 1 Lloyd's Rep. 431 and Stevens v. Midland Counties Ry. (1854) 10 Ex. 352. Further, malice should be proved by the plaintiff affirmatively: --Abrath v. N.E. Ry. (1886) 11 A C 247. Malice may sometime be inferred from absence of reasonable and probable cause, but this rule has no general application and there may be cases where it would be appropriate not to infer malice from unreasonableness. Further, if reasonable and probable cause is proved, the question of malice becomes irrelevant, and also defect of want of reasonable and probable cause cannot be supplied by evidence of malice--See Turner v. Ambler (1847) 10 Q B 252; Mitchell v. Jenkins; Brown v. Hawkes (1891) 2 Q B 718 and Herniman v. Smith (1938) A C 305. It would be proper here to quote the following observation of Denning, L.J. (as he then was) in Tempest v. Snowden (1952) 1 K B 130:

Even though a prosecutor is actuated by the most express malice, nevertheless he is not liable so long as there was reasonable and probable cause for the prosecution.

The same rule has been applied by the Courts in India and Pakistan. Several decisions on this point were brought to my notice by Mr. Fazeel. The first case on this point is the decision of the High Court, Lahore, in Abdul Shakoor v. Upton & Co. A I R 1924 Lah. 1 where it was held that in suits for malicious

prosecution, proof of the existence of malice itself is not sufficient but should be accompanied by proof of absence of reasonable and probable cause. The Lahore High Court reiterated this view in Nur Khan v. Jiwandas A I R 1927 Lah. 120 and Gobind Ram v. Kaju Ram AIR 1939 Lah. 504. The same view prevailed with the High Court of Madras in V.T. Srinivasa Thathachariar v. P. Thiruvenkatachariar A I R 1932 Mad. 601. This view also found approval of the Judicial Committee of the Privy Council in Balbhaddar Singh v. Badri Sah A I R 1926 P C 46 and in Raja Braja Sunder Deb and others v. Bamdeb Das and others A I R 1944 P C 1 in which last case it was further observed that malice cannot be inferred from the anger of the prosecutor.

As regards reasonable and probable cause, the classic definition is that given by Hawkins, J. in Hicks v. Faulkner (1881) 8 Q B D 167 that it is, "an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed." This definition was approved by Lord Atkin in his speech in Herniman v. Smith. But in a later decision of the House of Lords, Glinski v. McIver (1962) A C 726 Lord Devlin defined reasonable and probable cause to mean that there must be a cause (i.e. sufficient grounds) for thinking that the plaintiff was probably guilty of the crime imputed. Diplock, L.J. followed this definition in Dallison v. Caffery (1965) 1 Q B 348. It is not necessary that the prosecutor should have the belief that evidence is sufficient to secure the conviction. The requirement of law would be satisfied if the prosecutor has prima facie evidence pointing out towards the plaintiff's guilt Dawson v. Vasandau (1863) 11 W R 516. In an Australian case Commonwealth Life Assurance Society Ltd. v. Brain (1935) 53 C L R 343 Dixon, J. observed that it is enough that the prosecutor believes that the probability of the accused's guilt is such that upon general grounds of justice a charge against him should be brought. It is not necessary that the prosecutor should enter into an examination of the strength of the evidence for the defence. He is concerned only with the question whether there is a fit case to be tried--See Tempest v. Snowden; Glinski v. Mclver; Dallison v. Caffery. The rule may be summed up, according to Lord Devlin, Glinski v. McIver in this way: "Did the Prosecutor actually believe and did he reasonably believe that he had cause for prosecution?"

Unsurprisingly, courts have been duly vigilant in guarding against malicious prosecution by clearly identifying and addressing the unsalutary effects of such a phenomenon. It is appreciated that on account of malicious

prosecution, there is invariably the incurrence of stigma, mental anguish, severe dislocation caused to one's way of life, and irreparable damage caused to one's self-worth and sense of dignity to which the law is not and the courts should not be impervious to. In the case of *Ghulam Nabi Khan vs. Azad Government of State of Jammu & Kashmir* reported in *1984 CLC 325,* it was held accordingly that-

> *"Where a person of good reputation for his honesty, integrity and efficiency suffered malicious criminal prosecution that not only caused him mental and physical torture but also proved a big jolt to his reputation, then such person was justified in feeling aggrieved of injury caused to his good reputation and damages were awarded to him for such defamation."*

In positioning itself within the legal standards required to establish a case for malicious prosecution, this Court finds itself swayed by the following observations recorded in *Balbhaddar Singh and another vs. Badri Shah and another AIR 1926 PC 46* which were followed in *Naber Shaha vs. Hamsuddin and ors. 15 DLR (1963) 217; LEX/HEPK/0141/1962,* that with great lucidity expounds upon the burden of proof required to be discharged by a victim of such prosecution:

> *"In actions for malicious prosecution the burden of proof is upon the plaintiff to show that the prosecution of which he complains was instituted with malice and without probable cause.*
>
> *In an action for malicious prosecution the plaintiff has to prove that he was prosecuted by the defendant, that the proceedings complained of terminated in favour of the plaintiff if from their nature they were capable of so terminating, that the prosecution was instituted against him without any reasonable and probable cause and that it was due to a malicious intention of the defendant, and not with a mere intention of carrying the law into effect.*
>
> *The question is not: "Did the plaintiff commit the offence" or did defendant invent the offence against plaintiff; the two queries exhausting the possibilities of the situation. The question is: Has plaintiff proved that defendant invented and instigated the whole proceedings for prosecution."*

The significance attached on the global plane on measures of deterrence of malicious prosecution merits its due consideration in weight at this juncture. The International Covenant on Civil and Political Rights, 1966 (ICCPR) denotes the obligation of State in cases of miscarriage of justice resulting in wrongful conviction. Article 14 (6) of the ICCPR states:

> *"When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."*

In *Babloo Chauhan @ Dabloo vs. State Government of NCT of Delhi* reported in *247 (2018) DLT 31,* the High Court of Delhi, while dealing with an appeal on the issues of fine and awarding of default sentences without reasoning, and suspension of sentence during pendency of appeal, expressed its concerns about wrongful implication of innocent persons who are acquitted but after long years of incarceration, and the lack of a legislative framework to provide relief to those who are wrongfully prosecuted. The Court, vide its order dated 30.11.2017, called for the Law Commission of India to undertake a comprehensive examination of the issue highlighted in para 11 to 16 of the said order and make its recommendation thereon to the Government of India.

Pursuant to the aforesaid order of the High Court of Delhi the Law Commission of India defines wrongful prosecution as the case of miscarriage of justice where procedural misconducts- police or prosecutorial, malicious or negligent- resulted in wrongful prosecution of an innocent person, who was ultimately acquitted, with making an observation or recording a finding to that effect. The underlying sentiment being that such person should not have been

subjected to these proceedings in the first place. Furthermore, the said Commission clarified the ambit of 'wrongful prosecution' would include (i) malicious prosecution; and (ii) prosecutions instituted without good faith.

The Commission headed by Dr. Justice B S Chauhan, in its report, recommended for the enactment of specific legal provision, along with drafting the Code of Criminal Procedure (Amendment) Bill, 2018 containing the definition of malicious prosecution and detailing the procedure for seeking compensation, for redressal of cases of miscarriage of justice resulting in wrongful prosecution covering both the substantive and procedural aspects; i.e., a statutory and legal framework establishing the mechanism for adjudicating upon the claims of wrongful prosecution, and *inter alia*, award payment of compensation by the State, if so determined. Furthermore, the Commission recommended setting up a 'Special Court' in each district for adjudicating upon the claims of compensation for wrongful prosecution.

The United Kingdom, in conformity with its international obligations under the ICCPR, has already incorporated the provision of Article 14(6) into its domestic legislation, i.e., of ss. 133, 133A, and 133B the Criminal Justice Act, 1988 under Part XI subtitled 'Miscarriage of Justice'. In *Berry vs. British Transport Commission* reported in *[1961] 1 QB 149,* Diplock J. observed at page 159 that the action on the case for malicious prosecution could be founded upon any form of legal proceedings, civil or criminal, brought maliciously and without any reasonable or proper cause by the plaintiff against the defendant, but, as the action was in case, damage was an essential ingredient.

In the USA, claims against malicious prosecution known as § 1983 claims', fall under Title 42 providing that every person who, under colour of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. Moreover, as per the United States Code Title 28 § 1495, the United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim for damages by any person unjustly convicted of an offense against the United States and imprisoned. Apart from Federal Law, all the States in the US have their own respective laws providing for compensation monetary and/or non-monetary assistance to the victims of wrongful incarceration.

In cases of miscarriages of justice resulting in wrongful convictions, the Constitution of Germany [Grundgesetz (GG)], 1949, also referred to as the Basic Law for the Federal Republic of Germany, assigns under Article 34 the liability for violation of official duty and provides compensation to the wrongfully convicted. Moreover, the 'Law on Compensation for Law Enforcement Measures' (Strafverfolgungsentschädigungsgesetz) (StrEG) in force since 1971 is equipped with the provisions for providing compensation by the State.

On the issue of government machinery and executive and regulatory forces aligning to engineer, albeit through a slipshod process, a persecutory prosecution on questionable and trumped-up charges, this Court has

painstakingly perused the revelatory information divulged by and crucial indicators of such a probability various prosecution witnesses upon cross-examination. It is a wonder that the structural weaknesses in the prosecution's case represented by such information were not picked up at any stage in the case proceedings from trial up to the High Court Division to flay the prosecution's case one layer at a time.

Such state of affair merits, therefore, parading below some stark revelations coming across on cross-examination of several key prosecution witnesses as cumulatively discredit and demolish the maliciously pursued prosecution on the key charge of criminal breach of trust.

Relevant Cross-examinations

- **PW 1 Harunur Rashid**
    - In the cross-examination of Md. Harunur Rashid (Deputy Director, ACC) by the Counsel of Begum Khaleda Zia, Mr. Rashid stated that the Sonali Bank Ltd Ramna Corporate Branch Account Number 5416 form did not bear Begum Khaleda Zia's signature. He further asserted that there was no mention that the account was opened by her or that it was to be operated by her.
    - In the cross-examination for Mr. Tarique Rahman, Mr. Rashid opined that although Mr. Rahman had claimed that the impugned US dollars were sent by Kuwait Emir to help constituting the Zia Welfare Trust. Mr. Rashid did not communicate with the Kuwait embassy or the Foreign Ministry in order to ascertain truth of this claim. As per his statements, he *in fact* assumed that the claim was untrue.

- Mr. Rashid stated in his cross (for Begum Zia) that Begum Zia did not herself constitute the Trust but made someone else constitute the same. However, he further asserted that there was no mention of any orders or directions on part of Begum Zia in terms of facilitating any inter-bank transactions between Sonali Bank Ltd. Ramna Corporate Branch and Prime Bank Ltd. in relation to the Trust fund.
- Mr. Harunur Rashid further maintained in his cross that he never received any complaints from any organization, authority, or individuals regarding any irregularities or anomalous activities at the Trust constituted by dint of the Deed of Trust. Only an unnamed source was mentioned by him incidentally.

- **PW 2 S.M. Gaffarul Alam, S.I. CID, Dhaka**
  - In his cross-examination, PW2 S.M. Gaffarul Alam, the Sub-Inspector responsible for filing the FIR in this matter, stated that the FIR was not accompanied by a forwarding letter from the ACC. This statement was made while under cross-examination by the Counsel for Begum Khaleda Zia. Further, when cross-examined by Counsel for Tarique Rahman, Mr. Alam conceded that the FIR did not specify a time of occurrence. Instead, the FIR referenced a period of approximately fifteen years, spanning from 28.11.1993 to 28.3.2007. He also stated that the FIR specified no reasons for the considerable delay (or arguably inordinate) in filing the case.
- **PW 8 Afzal Hossain**
  - In the cross-examination for Tarique Rahman, PW 8 Afzal Hossain, Senior Vice President, Prime Bank Ltd., stated that none of the

papers that were seized bore any signatures from Mr. Tarique Rahman.

- **PW 9 Mazed Ali**
  - In the cross-examination for Begum Khaleda Zia, Mr. Mazed Ali, Accounts Officer, Prime Minister's Office, asserted that during the course of his employment at the Prime Minister's Office, he never saw any files for the Prime Minister Orphanage Fund. He further stated that there, in fact, is a fund named the Prime Minister Orphanage Fund (without substantiating why there were no files). He went on to say that although the files in relation to Prime Minister's Relief Fund and Prime Minister Welfare Fund had Begum Zia's signatures, however, no files in relation to Prime Minister's Orphanage Fund bore her signatures. Moreover, he mentioned that every year between 1991 to 2007, both internal and external audits happened, but no objections were raised in such audits against activities of the Orphanage Fund.
- **PW 10 Mr. Alfa Sani**
  - In his cross-examination by Counsel for Begum Zia, Mr. Alfa Sani, Administrative Officer, Prime Minister's Office, mentioned that during his employment at the Prime Minister's Office, he never handled any files regarding the said Prime Minister's Orphanage Fund. He further asserted that while there were separate files and dossiers on Prime Minister's Relief Fund and Prime Minister's Welfare Fund, he did not know if there were any files, dossiers, or registers on the Orphanage Fund at the Prime Minister's Office.

- **PW 11 Mokhlesur Rahman (Administrative Officer)**
    - Mr. Mokhlesur Rahman, Administrative Officer, Prime Minister's Office, in his cross-examination by the Counsel for Begum Zia asserted that he had no knowledge about any accounts, transactions, or files related to any Prime Minister's Orphanage Fund. He further mentioned that Mr. Mazed Ali presented the files and dossiers when requested by Mr. Harunur Rashid. However, Mr. Mokhlesur had no knowledge from where the files were so brought by Mr. Mazed Ali.

- **PW 12 Monjur Hossain (AGM, Sonali Bank, Ramna Branch)**
    - In his cross-examination for Begum Khaleda Zia, Monjur Hossain said that the papers as seized by Mr. Harunur Rashid, including the Accounts Opening Form and Signature Card with respect to the Prime Minister's Orphanage Fund (against the Account 5416) bore no signatures of Begum Zia. He further noted that there was no permission letter or memorandum (*smarokpotro*) letter issued by the Prime Minister's Office along with the Accounts Opening Form either. Other than the transaction details as seized, Monjur Hossain claimed to have no knowledge about any other transaction made by and through the said Orphanage Fund. During the course of his service, Mr. Hossain said, that no communications regarding the deposit, status, transaction, remittance or audit objection with respect to the said Orphanage Fund were made by the Prime Minister's Office through any office letter or memorandum.

- **PW 13 Mohiduddin Ahmed (Senior Principal Officer, Sonali Bank Ltd)**
    - In the cross-examination, Mohiuddin Ahmed noted that the seized documents did not bear any signatures of Begum Khaled Zia.
- **PW 14 Syed Jaglul Pasha, Manager (Joint Secretary), Privatization Commission**
    - In his cross-examination by the Counsel for Begum Zia, Syed Jaglul Pasha claimed that the Prime Minister's Orphanage Fund had a separate ledger but noted that he had not provided the said ledger to the ACC. Similarly, he claimed that he had seen the cheques of the Orphanage Fund but that he had not provided the same to the ACC either.
- **PW 20 Towhidur Rahman Khan, Manager (Joint Secretary), Biniyog Board**
    - In his cross-examination, Mr. Khan noted that the original files with regard to the Prime Minister's Orphanage Fund had been missing and that during his service, the said files had never been found.
- **PW 21 Abdul Barek Bhuiyan (Account Officer, Prime Minister's Office)**
    - In the cross-examination for the accused Begum Khaleda Zia, Mr. Bhuiyan noted that while in service, he had never seen original files of the said Prime Minister's Orphanage Fund.
- **PW 25 Molla Farid Ahmed (Vice President Prime Bank Ltd)**
    - In his cross-examination, Mr. Farid Ahmed noted that in the relevant papers (Exhibits VI, VIII, IX), there were no signatures or initials of Mr. Tarique Rahman.

- **PW 26 Khandokar Abdus Sattar (Retired Ambassador, Retired Director General, Foreign Ministry, Bangladesh Government)**
  - In his cross-examination by the Counsel for Begum Zia and Tarique Rahman, Mr. Sattar said that he had no knowledge if/whether the said money's source was Kuwaiti Emir.
- **PW 27 Md. Jahangir Alam (Deputy Officer Land, Nandigram, Bogra)**
  - In the cross-examination, Mr. Alam revealed several irregularities in investigation. He stated that in their report, there was no mention of any locals who they asked about the Trust Property.
- **PW 31 Harunur Rashid (Deputy Director, ACC)**
  - In the cross-examination for the accused Begum Khaleda Zia, Mr. Rashid asserted that he had not sent any letters to the Foreign Ministry or Kuwait Embassy to ascertain if the source of the money was the Kuwait Ameer. He noted that he knew (i.e., assumed) that the said money had not come from Kuwait Ameer.
  - He further revealed that no internal or external auditors in relation to any internal or external audits of the Prime Minister's Office were made a witness in this case.
  - He noted further that per the Investigation Report, as submitted by Mr. Nur Ahmed (PW 32), Trust was registered as a Private Trust and that the members of the Trust were not to be treated as public servants.
  - He also noted that there was no proof of any approval from Begum Zia regarding the opening of the FDRs.

- **PW 32 Nur Ahmed, Director General, ACC**
    - During the cross-examination, Nur Ahmed admitted that he had not documented the details of his daily inquiries in the prescribed form or register, as stipulated by Schedule 7 of the Anti-Corruption Commission Rules 2007 and required under Rule 7(7) of the same. He further acknowledged that Begum Khaleda Zia's name was not on the list of accused individuals recorded in his report and in the description of the accusations documented therein. In his cross-examination, Mr. Ahmed further stated that his investigation report noted the absence of any available documents or files pertaining to the management of the Orphanage fund by the former Prime Minister's Office, thus precluding him to comment with certainty on Begum Zia's alleged involvement. He further asserted that he received no complaints over misappropriation related to the Zia Memorial Trust. He further affirmed that the Trust is a private entity (i.e., a Private Trust) and that the accused individuals were not public servants. Moreover, he stated that the case diary did not contain the filing date of the complaint or even the complainant's name.

These inherent flaws in the prosecution's case and indeed the highly motivated and persecutory nature of the case as revealed through the cross-examinations above took centre stage in Begum Zia's section 342 statement. In the course of providing the statement Begum Zia exposed the weaknesses of the case to their very core and which has proven to be very illuminating at this appellate stage in her case.

On 2.2.2017 Begum Zia, during her examination under section 342 of the CrPC categorically stated that she would not provide a statement at that time. She requested time to prepare and indicated she would later give a complete statement. After the examination for the day, Begum Zia asserted that despite officially expressing her lack of confidence in the court, she was compelled to undergo examination under section 342 on that day. She said she would obtain a certified copy of the examination and, after discussion with her lawyer, would make a formal statement.

On 19.10.2017, she began her statement under section 342, which continued with short adjournments until 5.12.2017. During this time, she detailed instances of political harassment she had experienced. She emphasized a statement made by the then Prime Minister Sheikh Hasina at a public meeting, alleging that Begum Zia had misappropriated funds from an orphanage trust. Begum Zia stated that the Prime Minister's comments about an ongoing case in a public sitting constituted interference, potentially influencing the court's processes and judicial independence. Further alluding to potential malicious prosecution, Begum Zia noted that corruption and extortion cases against the incumbent Prime Minister Sheikh Hasina were withdrawn and dismissed after the latter assumed power. Conversely, cases against Begum Zia had persisted and were being proceeded with unusual speed, if not alarming alacrity, with new cases also being filed. In her statement, Begum Zia also pointed out discrepancies in the prosecution's statements that were revealed during cross-examination. She concluded by denying all charges, asserting they were false, fabricated, and malicious, brought with aim only to harass her.

The question that arises at this juncture is whether in the alleged commission of a criminal breach of trust there was any entrustment of any

property upon Begum Khaleda Zia and whether within the meaning of section 405 of the Penal Code she had dishonestly used or disposed of that property in violation of any direction of law prescribing the mode in which such a trust was to be discharged. It is to be noted that there arises an assumption of a legal obligation from the very act of entrustment and there is a bar imposed under the law in section 405 in that such essentially fiduciary obligation is nullified when the entrustee acts dishonestly for wrongful gain or in a manner that causes wrongful loss to another.

Learned Advocate, Mr. Md. Ruhul Quddus in so constructing section 405 asserts that in the facts there was no entrustment as such of any property and no actual dominion over the same within the meaning of section 405. Nor in the facts is there present any element of a breach of any legal contract, implicit or explicit, given that one would be hard-pressed to locate such an assumption of a contractual obligation by Begum Khaleda Zia in the facts.

Evident from the High Court Division records is the fact that learned Advocate Mr. A.J. Mohammad Ali and Mr. Khandaker Mahbub Hossain drew the High Court Division's attention to yet another angle to section 405 as pertains to violation of any legal prescription contained in any law. It was their contention in the facts, and aptly so, that the law applicable here is the Trusts Act, 1882 and it is by reference to the provisions of that piece of legislation that the courts of law are bound to assess the liability, if any, of Begum Khaleda Zia under a section 405 scenario. Evidently, however, the High Court Division completely ignored that line of argument and did not at all engage in discussing at any length this focal and crucial issue raised by Begum Khaleda Zia's lawyers. It is now submitted that should the Trusts Act have been taken up for substantive consideration, the High Court Division would have readily

been directed to the provisions of section 94 by the terms of which Begum Khaleda Zia assumed the role of a constructive trustee in the facts between 1991-1993. If at all, in the facts, the question of a liability for breach of trust as envisaged under section 23 of the Act could apply to the post-1993 scenario governed solely by the trust settlement deed to which Begum Khaleda Zia is not privy at all.

This Court deduces form the facts that the constructive trustee Begum Khaleda Zia discharged her responsibilities under the Trusts Act fully upon transfer of the funds over which she had dominion as custodian from 1991 onwards thereof and with which she had been entrusted until 1993. But that is where her role ended. In other words, Begum Khaleda Zia had no dominion over the corpus of the fund beyond her capacity as a constructive trustee i.e., 1991-1993 and at no time beyond that period can any *actus reus* be imputed to her with regard to the handling or dealings in such property in violation of the Trusts Act, 1882 or indeed within the meaning of section 409 of the Penal Code.

It has been contended on behalf of Begum Khaleda Zia in Criminal Appeal Nos. 64 and 63 of 2024 that the High Court Division committed an error of law in convicting the Appellant by holding that it was her obligation *“to secure due welfare and proper use of fund obtained”* as no such requirement exists either under section 5(1) of the PCA, 1947 or section 409 of the Penal Code.

It is advantageous to examine section 5(1) of the PCA, 1947 or section 409 of the Penal Code. However, the offence mentioned in section 405 of the Penal Code is punishable under section 409 while the offences mentioned in

section 5(1) of the PCA, 1947 is punishable under section 5(2). Section 405 lays down that-

> "*Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust*".

Section 5 of the PCA lays down the following-

> *5(1) A public servant is said to commit the offence of criminal misconduct-*
> *(a) if he accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person, any gratification (other than legal remuneration) as a motive or reward such as is mentioned in section 161 of the Penal Code, or*
> *(b) if he accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person any valuable thing without consideration or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, or*
> *(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do, or*
> *(d) if he, by corrupt or illegal means or by otherwise abusing his position as public servant, obtains or attempts to obtain for himself or for any other person any valuable thing or pecuniary advantage, or*
> *(e) if he, or any of his dependents, is in possession, for which the public servant cannot reasonably account, of pecuniary resources or of property disproportionate to his known sources of income.*
> *Explanation.- In this clause "dependent" in relation to a public servant, means his wife, children and step-children, parents, sisters and minor brothers residing with and wholly dependent on him.*
> *(2) Any public servant who commits or attempts to commit criminal misconduct shall be punishable with imprisonment for a term which may extend to seven years, or with fine, or with both, and the pecuniary resources or property to which the criminal misconduct relates may also be confiscated to the State.*
> *..."*

From the above provisions of law, it is divulged that neither section 405 of the Penal Code nor section 5(1) of the PCA, 1947 contains the words *"to secure due welfare and proper use of fund obtained"*. However, the Golden Rule of interpretation gives the court latitude to modify the literal meaning of a law to avoid an absurd or unreasonable outcome. The said rule of interpretation essentially provides the court a way to deviate from the strict, literal meaning of words when that meaning would lead to an unjust or nonsensical result or an absurdity. Given that, if a person dishonestly misappropriates or uses the property over which he has dominion, he is punishable for the offence. It is, therefore, palpably clear that despite there are no words *"to secure due welfare and proper use of fund obtained"* couched in section 405 of the Penal Code or section 5(1) of the PCA, 1947 it will suffice to hold a public servant guilty if it is proved that he dishonestly misappropriates or does not make proper use of the property over which he has dominion.

In the case in hand, indeed, the crux of the matter is that how far the prosecution proved the allegations under section 405 of the Penal Code or section 5(1) of the PCA, 1947. However, it is evinced from the record that the prosecution utterly failed to prove the allegations against Begum Khaleda Zia as stated above beyond reasonable doubt. In any case of the matter, the probe into the element of "*securing due welfare and proper use of fund obtained"* is a superfluous one given our findings hereinabove, that there was no outright entrustment of property to Begum Khaleda Zia to begin with. In the facts, accordingly, and from the evidence adduced there is no ground to hold that the High Court Division's deduction as to *"secure due welfare and proper use of fund obtained"* was in anyway well-founded.

It has further been contended on behalf of Begum Khaleda Zia that the enhancement of sentence can only be made in appeal preferred against the judgment passed by the trial court. Section 417A of the CrPC provides for the provisions for preferring appeal against the inadequacy of sentence. Section 439(5) of the CrPC lays down that where an appeal lies under the CrPC and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed. However, in the case in hand, no appeal was filed by the ACC against the inadequacy of sentence.

From a perusal of the judgment of the trial court it appears that the Special Judge convicted Begum Khaleda Zia under section 409 of the Penal Code read with section 5(2) of the PCA, 1947. It is settled position of law that a person aggrieved against the judgment and order of conviction passed by the Special Judge, is entitled to prefer appeal before the High Court Division under section 10(1) of the Criminal Law Amendment Act, 1958. However, there is no categorical provision in the Criminal Law Amendment Act as to whether the State or the ACC can file revision against the inadequacy of sentence passed by the Special Judge. In this regard, we may profitably extract section 10 of the Criminal Law Amendment Act, 1958.

> "*10. (1) An appeal from the judgment of a Special Judge shall lie to-*
> *(a) the High Court Division, if the Special Judge is or has been a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge;*
> *(1A) The Court to which an appeal lies under sub-section (1) shall also have powers of revisions*.
> *(2) Notwithstanding the provisions of section 417 of the Code of Criminal Procedure, 1898, in any case tried by a Special Judge appointed by the Government under section 3, in which such Special Judge has passed an order of acquittal, the Commission may direct the Public Prosecutor to present an appeal to such Court as aforesaid.*
> *...."*

(Emphasis added by this Court)

Thus, an appeal under section 10(1) of the Criminal Law Amendment Act shall lie before the High Court Division against the judgment of the Special Judge while section 10(1A) invests the High Court Division with the power of revision. However, it has not been categorically provided in the Criminal Law Amendment Act whether either appeal or revision will lie against the inadequacy of sentence passed by the Special Judge. That said, it is the case, moreover, there is no express statutory bar to filing revision in the instance of inadequate sentencing passed by the Special Judge. Given such circumstance, the overwhelming consideration that the Criminal Law Amendment Act being a piece of special legislation governs necessarily sentencing under an equally special piece of legislation like the PCA. It necessarily follows, therefore, that under such circumstances the door is always open under section 10(1A) of the Criminal Law Amendment Act to file revision even in instances of inadequate sentences. Therefore, we must necessarily conclude that in the given circumstances, it may logically be deduced that revision will lie in the High Court Division under section 10(1A) of the Criminal Law Amendment Act. The above legal exposition finds support from the decision made by this Division in the case of *Durnity Daman Commission vs. Rashedul Huq Chishti and Ors,* reported in *18 ADC (2021) 636.* This Court observed that-

> "*From the above discussion, this Division holds the view that a revision under section 10(1A) of the Act of 1958 against an order of the Special Judge is quite maintainable and alternatively there opened a new avenue of preferring an appeal under section 22 of the Money Laundering Prevention Act of 2012.*"

Again, section 5 of the Criminal Law Amendment Act, 1958 provides that-

> "*5. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1898, or in any other law, the offences specified in the Schedule shall be triable exclusively by a Special Judge*."

It, thus, appears that the *non obstante* clause incorporated in section 5 of the Criminal Law Amendment Act excludes the application of general law, and as such the special law shall prevail over the provisions of CrPC. Admittedly, the offences punishable under section 409 of the Penal Code and section 5(2) of the PCA, 1947 are exclusively triable by the Special Judge. Having regard to the above, we are of the opinion that since there is no provision of preferring appeal against the inadequacy of sentence passed by the Special Judge, the revision will lie against the same before the High Court Division under section 10(1A) of the Criminal Law Amendment Act. Such finding as above, though not in consonance with the arguments pleaded by learned Counsel for Begum Khaleda Zia, does not operate in any way to detract from the centrality of our findings above that the High Court Division though rightly invested with the power of revision arrived at a grossly wrong conclusion taking the route of malicious prosecution. It is evident that in the case of Begum Khaleda Zia the High Court while exercising the revisional jurisdiction enhanced her sentence without taking into consideration the evidence on record, and hence the impugned judgment of the High Court Division is liable to be scrapped.

Our summary of core findings are, accordingly, enumerated hereinbelow:

I. The convictions under section 409 of the Penal Code, 1860 for alleged criminal breach of trust in the absence of the constitutive ingredients of such offence as defined under section 405 with

illustrations are misconceived and have resulted in a travesty of justice.

II. To be an offence of Criminal Breach of Trust, there must be an entrustment/dominion over the property belonging to another and the same has to be dishonestly misappropriated as per section 405 of the Penal Code, 1860 but in the instant case, there was no element of entrustment upon the Appellant Begum Khaleda Zia.

III. The general principle of criminal jurisprudence is that the State has to prove allegation(s) against an accused beyond all reasonable doubts but both the courts below have violated the said principle and convicted the Appellants on an trumped-up charges without seeking the aid of the applicable law.

IV. Both the High Court Division and the Trial Court below passed their respective judgments on the basis of hypothetical presumptions and accusations not based on legal evidences.

V. The ACC has stepped beyond its jurisdiction to have initiated the instant criminal proceeding as the issue revolves around a private trust and there is no accusation/ complaint from the relevant party concerned.

VI. The very initiation of proceedings is barred by law and as such not only the judgments below but also the entire proceedings should, therefore, be set aside giving benefit to all individuals who have been maliciously prosecuted.

In conclusion, in these proceedings we have been alerted to the fact that how much more a court is than a courtroom. It is a process and a spirit

structured and nurtured to prevent the violation of constitutional guarantees and the withholding of due process of law. In other words, courts are there to ensure that judicial proceedings are not reduced to being sacrificial rituals.

In the premises made above, we pass the following order:

All the appeals are, hereby, allowed by this Division's unanimous decision.

Accordingly, the impugned judgment and order dated 30.10.2018 passed by the High Court Division in Criminal Appeal No. 1676 of 2018 with Criminal Appeal Nos. 2215, 2292 of 2018 and Criminal Revision No. 741 of 2018, and the judgment and order dated 8.2.2018 passed by the Special Judge, Special Judge Court No. 5, Dhaka in Special Case No. 17 of 2017 are, hereby, set aside.

Consequently, all the Appellants having not been found guilty of the charges leveled against them, stand fully acquitted.

The proceedings constituting the subject matter of these appeals are found to be a manifest contrived misapplication of the law as tantamount to malicious prosecution.

This judgment shall also extend to other convicted persons who, however, did not prefer any appeal.

This decision shall, resultantly restore the Appellants' and all other convicts' dignity, reaffirm their innocence, and thereby, put an end to the unwarranted proceedings initiated against them.

All Appellants on bail shall necessarily stand discharged from their respective bail bonds.

The office is directed to communicate the order forthwith to the High Court Division as well as the concerned authority for taking necessary action.

C.J.

J.

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J.

J.

15th January, 2025
Sarwar, RRO/Total words- 18055